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Nos. 06-340, 06-549

IN THE

Supreme Court of the United States

NATIONAL ASSOCIATION OF HOME BUILDERS AND THE ENVIRONMENTAL PROTECTION AGENCY
Petitioners,

v.

DEFENDERS OF WILDLIFE ET AL.
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* NATIONAL HYDROPOWER ASSOCIATION, AMERICAN PUBLIC POWER ASSOCIATION, NORTHWEST HYDROELECTRIC ASSOCIATION, THE CITY OF TACOMA, PUBLIC UTILITY DISTRICT NO. 1 OF CHELAN COUNTY, PUBLIC UTILITY DISTRICT NO. 1 OF DOUGLAS COUNTY, PUBLIC UTILITY DISTRICT NO. 1 OF GRANT COUNTY, PACIFICORP, AND THE UNITED WATER CONSERVATION DISTRICT IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

In this brief, *Amici* respond solely to the following question presented by Petitioner Environmental Protection Agency:

Whether § 7(a)(2) of the Endangered Species Act of 1973, 16 U.S.C. § 1536(a)(2), which requires each federal agency to insure that its actions do not jeopardize the continued existence of a listed species or modify its critical habitat, overrides statutory mandates or constraints placed on an agency's discretion by other Acts of Congress.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CITED AUTHORITIES	iv
INTERESTS OF *AMICI CURIAE*	1
A. The *Amici* Represent Interests of the United States' Hydroelectric Industry	2
B. The Impact of the Ninth Circuit's Decision on the Hydroelectric Group	5
SUMMARY OF ARGUMENT	11
ARGUMENT	12
I. SECTION 7(a)(2) OF THE ENDANGERED SPECIES ACT OF 1973 DOES NOT OVERRIDE STATUTORY MANDATES OR CONSTRAINTS PLACED ON AN AGENCY'S DISCRETION BY OTHER ACTS OF CONGRESS	12
A. The Endangered Species Act	12
B. The Ninth Circuit's Decision Improperly Expands the Scope of the Endangered Species Act	13
C. Since *TVA v. Hill*, Federal Courts Have Uniformly Rejected Efforts to Expand the Application of § 7(A)(2) to Non-discretionary Actions	21
CONCLUSION	26

TABLE OF CITED AUTHORITIES

CASES Page

Am. Forest & Paper Ass'n v. EPA, 137 F.3d 291, 298 (5th Cir. 1998) 17, 22, 23
Babbitt v. Sweet Home Chapter of Cmties. for a Great Or., 515 U.S. 687 (1995) 17
Bennett v. Spear, 520 U.S. 154 (1997) 14
Cal. Sportfishing Prot. Alliance v. Pac. Gas & Elec. Co., 472 F.3d 593 (9th Cir. 2006) 9
Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984) 17
Citizens Against Rails-to-Trails v. Surface Transp. Bd., 267 F.3d 1144 (D.C. Cir. 2001) 17, 18
Defenders of Wildlife v. EPA, 420 F.3d 946 (9th Cir. 2005) ..... *passim*
Defenders of Wildlife v. EPA, 450 F.3d 394 (9th Cir. 2006) 8, 16
Dep't of Transp. v. Public Citizen, 541 U.S. 752 (2004) 16, 17
Edelman v. Lynchburg College, 535 U.S. 106 (2002) 20
EEOC v. Associated Dry Goods Corp., 449 U.S. 590 (1981) 20
EEOC v. Shell Oil Co., 466 U.S. 54 (1984) 20
Envtl. Prot. Info. Ctr. v. Simpson Timber Co., 255 F.3d 1073 (9th Cir. 2001) 13, 17, 24
First Iowa Hydro-Elec. Coop. v. Fed. Power Comm'n, 328 U.S. 152 (1946) 5
Ground Zero Center for Non-Violent Action v. U.S. Department of the Navy, 383 F.3d 1082 (9th Cir. 2004) 24
Marbled Murrelet v. Babbitt, 83 F.3d 1068 (9th Cir. 1996) 16, 17, 24
Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005) 17

TABLE OF CITED AUTHORITIES—Continued

Page

Nat'l Wildlife Fed'n v. U.S. Army Corps of Eng'rs, 384 F.3d 1163 (9th Cir. 2004) 18
Nat'l Wildlife Fed'n v. Espy, 45 F.3d 1337 (9th Cir. 1995) 18
Natural Res. Def. Council v. Houston, 146 F.3d 1118 (9th Cir. 1998) 16, 17, 23, 24
Norton v. S. Utah Wilderness Alliance, 542 U.S. 55 (2004) 13
Pac. Gas & Elec. Co. v. FERC, 720 F.2d 78 (D.C. Cir. 1983) 6
Pacific Rivers Council v. Thomas, 30 F.3d 1050 (9th Cir. 1994) 13
Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC, 962 F.2d 27 (D.C. Cir. 1992) 9, 15, 17, 21, 22
Riverside Irrigation Dist. v. Andrews, 568 F. Supp. 583 (D. Colo. 1983) 21
Riverside Irrigation Dist. v. Andrews, 758 F.2d 508 (10th Cir. 1985) 21
Sierra Club v. Babbitt, 65 F.3d 1502 (9th Cir. 1995) 13, 23
Sw. Ctr. for Biological Diversity v. U.S. Bureau of Reclamation, 143 F.3d 515 (9th Cir. 1998) ... 26
Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978) ..... *passim*
Turtle Island Restoration Network v. National Marine Fisheries Service, 340 F.3d 969 (9th Cir. 2003) 24
W. Watershed Project v. Matejko, 456 F.3d 922 (9th Cir. 2006) 13

TABLE OF CITED AUTHORITIES—Continued

STATUTES — Page

Federal Power Act, 16 U.S.C. §§ 791-828 (2000).
§ 4(e), 16 U.S.C. § 797(e) 6
§ 6, 16 U.S.C. § 799 6
§ 10(a)(1), 16 U.S.C. § 803(a)(1) 6
§ 15, 16 U.S.C. § 808 ..... *passim*
§ 23(b), 16 U.S.C. § 817(b) 6
§ 28, 16 U.S.C. § 822 6

Endangered Species Act, 16 U.S.C. § 1531 *et seq.* (2000).
§ 2, 16 U.S.C. § 1531(c)(1) 25
§ 7(a)(1), 16 U.S.C. § 1536(a)(1) 25
§ 7(a)(2), 16 U.S.C. § 1536(a)(2) ..... *passim*
§ 7(a)(3), 16 U.S.C. § 1536(a)(3) 12
§ 7(a)(4), 16 U.S.C. § 1536(a)(4) 12
§ 7(B)(3)(A), 16 U.S.C. § 1536(b)(3)(A) 13
§ 7(e), 16 U.S.C. § 1536(e) 12, 22

Clean Water Act, 33 U.S.C. § 1251 *et seq.* (2000).
§ 402, 33 U.S.C. § 1342(b) 14, 22
§ 404, 33 U.S.C. § 1344 5

OTHER STATUTES

16 U.S.C. §§ 5501-5509 (2000) 24
28 U.S.C. § 1331 (2000) 14
Act of December 28, 1979, Pub. L. No. 96-159, § 4, 93 Stat. 1226 (1979) 20
River and Harbor Act of 1945, Pub. L. No. 79-14, § 2, 59 Stat. 10 (1945) 18

REGULATIONS

18 C.F.R. § 16.18(b), (c) (2006) 7
50 C.F.R. § 402.02 (2006) 13, 26

TABLE OF CITED AUTHORITIES—Continued

Page

50 C.F.R. § 402.03 (2006) ..... *passim*
50 C.F.R. § 402.14(h) (2006) 13

OTHER MATERIALS

51 Fed. Reg. 19,937 (1986) 17
Patrick A. Parenteau, The Exemption Process and the God Squad, reprinted in ENDANGERED SPECIES ACT: LAW, POLICY, AND PERSPECTIVES 131 (Baur & Irvin eds. 2002) 22
Zygmunt J.B. Plater, *Statutory Violations and Equitable Discretion*, 70 Calif. L. Rev. 524 (1982) 19

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INTERESTS OF *AMICI CURIAE* [1]

This brief solely addresses the Ninth Circuit holding that the Endangered Species Act ("ESA") includes an affirmative

[1] Pursuant to Rule 37.6, the Hydroelectric Group states that no counsel for another party authored this brief, and that only Hydroelectric Group members made monetary contributions to its preparation and submission.

grant of authority to an action agency to disregard other statutory limitations, and that the nature of the agency action—whether it is discretionary or not—is not altogether significant. The Ninth Circuit decision creates the potential for unnecessary and irreconcilable conflicts between the ESA and other statutes. These conflicts could disrupt or interfere with the Nation's electrical energy supply. To prevent potential conflicts between the ESA and Federal Power Act ("FPA"), the *Amici* submit this brief in support of the Petitioners.

A. The *Amici* Represent Interests of the United States' Hydroelectric Industry.[2]

The National Hydropower Association ("NHA"); American Public Power Association ("APPA"); Northwest Hydroelectric Association ("NWHA"); City of Tacoma, Washington ("Tacoma"); Public Utility District No. 1 of Chelan County, Washington ("Chelan"); Public Utility District No. 1 of Douglas County, Washington ("Douglas"); Public Utility District of Grant County, Washington ("Grant"); PacifiCorp; and United Water Conservation District ("UWCD") (collectively referred to as "the Hydroelectric Group") represent interests of the United States' hydroelectric industry.

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[2] Consent by all of the parties has been given to the Hydroelectric Group for filing this brief. Petitioners National Association of Home Builders, Southern Arizona Home Builders Association, Home Builders Association of Central Arizona, Arizona Chamber of Commerce, Arizona Mining Association, Arizona Association of Industries, Greater Phoenix Chamber of Commerce, and American Forest & Paper Association; Respondents Defenders of Wildlife, Center for Biological Diversity, and Craig Miller; and the State of Arizona have submitted letters to the Court consenting to the filing of all *amicus curiae* briefs in this matter. The U.S. Environmental Protection Agency ("EPA") has provided written consent to the Hydroelectric Group to file this brief. The Hydroelectric Group submitted EPA's consent letter to the Court concurrent with its filing of this brief.

NHA is a national association representing the interests of the United States' hydroelectric industry. NHA represents sixty-one percent of domestic, non-federal hydroelectric capacity, constituting almost 80,000 megawatts ("MW"), across North America. NHA's 140 members include community-owned utilities, investor-owned utilities, independent power producers, equipment manufacturers, environmental and engineering consultants, and attorneys from all regions of the country.

APPA is a national organization representing the interests of more than 2,000 community-owned electric utilities throughout the United States that deliver electric energy to approximately forty-three million citizens. Hydroelectric projects comprise over twenty-one percent of public power's total generation.

NWHA is a non-profit trade association that represents and advocates on behalf of the Northwest hydroelectric industry. NWHA has 84 members from all segments of the industry.

Tacoma, Chelan, Douglas and Grant are municipal corporations chartered under the laws of the State of Washington. They own and operate municipal electric utility systems that engage in the generation, transmission, and distribution of electric power and energy in the State of Washington. They also purchase and sell electric energy and power at wholesale and retail.

Tacoma owns and operates four hydroelectric projects with a total generating capacity of 719 MW. Eighty-seven percent of the electricity Tacoma produces or purchases for its customers is produced from hydroelectric projects.

Chelan owns and operates three hydroelectric projects with a total generating capacity of 2,000 MW, providing electricity to its customers and selling approximately sixty-three percent of the total generating capacity of these facilities to other wholesale purchasers throughout the Pacific Northwest.

Douglas owns and operates the Wells Hydroelectric Project, an 840 MW facility located on the Columbia River, and sells approximately seventy percent of the total generating capacity of this facility under long-term power sales contracts to one public utility district, four Pacific Northwest investor-owned utilities and one Indian tribe.

Grant owns and operates four hydroelectric projects with a total generating capacity of over 2,000 MW, providing electricity to its customers and selling over sixty percent of the total generating capacity of these facilities to other wholesale purchasers throughout the Pacific Northwest.

PacifiCorp is a regulated electric company serving retail customers in portions of the states of Utah, Oregon, Wyoming, Washington, Idaho and California. It delivers electricity to customers in Utah, Wyoming and Idaho as Rocky Mountain Power and to customers in Oregon, Washington and California as Pacific Power. PacifiCorp owns and operates 50 hydroelectric plants and serves as the operator for two additional hydroelectric projects. PacifiCorp's hydroelectric projects have an installed capacity of about 1,073 MW, which represents nearly 11 percent of the company's annual power generation.

UWCD is a public Special District under the laws of the State of California. UWCD owns and operates facilities, and manages programs, for the recharge of groundwater supplies in the highly productive but overdrawn aquifers in central Ventura County, California. These aquifers support a population that exceeds 350,000 and an agricultural economy of approximately $1.5 billion per year. The water supplies for UWCD's groundwater recharge activities originate from storage and diversion projects in the Santa Clara River watershed. Some of these projects have federal involvement, including the Santa Felicia Project, which co-generates electrical energy from flows otherwise discharged for water resource management purposes. Up to 2.4 MW of electricity is generated

under a Federal Energy Regulatory Commission ("FERC") license and sold entirely to the Southern California Edison Company.[3]

Together, NHA, APPA, NWHA, Tacoma, Chelan, Douglas, Grant, PacifiCorp, and UWCD generate a significant percentage of all electricity in the United States, and a significant portion of the non-federally generated electric power in the Northwest. Hydroelectric projects are an important source of this energy, accounting for nearly ten percent of national electric production each year and more than eighty percent of national renewable energy. The nation's hydroelectric projects also provide numerous other benefits to the communities in which they are located, such as municipal and industrial water supply, navigation, flood control, irrigation, recreation, and fish and wildlife habitat.

B. The Impact of the Ninth Circuit's Decision on the Hydroelectric Group.

Almost all non-federally-owned hydroelectric projects are subject to the FPA's comprehensive regulatory scheme. Congress enacted the FPA (and its predecessor statute, the Federal Water Power Act of 1920) in order "to secure a comprehensive development of national resources. . . ." *First Iowa Hydro-Elec. Coop. v. Fed. Power Comm'n*, 328 U.S. 152, 180-81 (1946). Under the FPA, FERC has exclusive authority to issue licenses authorizing the construction, operation, and maintenance of new and existing hydroelectric

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[3] Other projects include the Freeman Diversion Project, which does not generate electrical energy but was constructed under a loan from the U.S. Bureau of Reclamation ("BOR"), and other river management programs for which U.S. Army Corps of Engineers ("Army Corps") Clean Water Act ("CWA") § 404 permits are sought. Because of the extensive federal involvement in these projects, they also may be impacted by the Ninth Circuit decision, but differently than the UWCD FERC-licensed hydroelectric projects.

projects.[4] *See* 16 U.S.C. §§ 797(e), 803(a)(1), 808, and 817(b). In carrying out its statutory responsibilities, FERC is required to consider all the factors affecting the public interest in the comprehensive development of a waterway, including appropriate conditions to protect the environment.[5] *Id.* §§ 797(e), 803(a)(1).

To encourage and attract the enormous amount of capital required to develop hydroelectricity, Congress included safeguards in the FPA to help ensure positive returns on investments. For example, FPA § 15 requires that licenses be issued on reasonable terms. 16 U.S.C. § 808(a)(1). Under FPA § 6, FERC is authorized to issue licenses with terms of up to fifty years and is prohibited from amending licenses, once they are accepted, without the consent of the licensee. 16 U.S.C. § 799; *Pac. Gas & Elec. Co. v. FERC*, 720 F.2d 78, 83-84 (D.C. Cir. 1983). Although many new licenses contain reopeners and/or adaptive management provisions, FPA § 28 restricts the authority to alter the terms of a license, or otherwise impair the rights of the licensee, once a license has been issued. 16 U.S.C. § 822.

Because of the complexities of the FERC relicensing process, the processing time—i.e. the time from license application to FERC's issuance of the license—is substantial, averaging fifty-two months, with many projects taking much

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[4] Federally operated projects, such as those operated by the Tennessee Valley Authority, the Bonneville Power Administration, the Army Corps, and BOR are not licensed by FERC.

[5] In addition to the FPA, hydroelectric projects are now subject to the requirements of a variety of environmental statutes, such as the National Environmental Policy Act ("NEPA"), the CWA, the Fish and Wildlife Coordination Act, the Federal Land Policy and Management Act, and the National Historic Preservation Act. This includes being subject to the requirements of § 7 of the ESA.

longer.[6] This results in a very large number of existing FERC licenses expiring prior to the completion of the FERC relicensing process.

Under FPA § 15, if, by the expiration of an existing license, FERC does not issue a new license for the project or does not otherwise achieve a federal takeover of the project, "the commission shall issue from year to year an annual license to the then licensee under the terms and conditions of the existing license until the property is taken over or a new license is issued as aforesaid." 16 U.S.C. § 808(a)(1). In addition, FERC's regulations provide, in part, that "[t]he Commission will issue an annual license to an existing licensee under the terms and conditions of the existing license upon expiration of its existing license. . . . ", and further that "[a]n annual license issued under this section will be considered renewed automatically without further order of the Commission, unless the Commission orders otherwise." 18 C.F.R. § 16.18(b), (c).

There are approximately 2,500 hydroelectric projects across the country subject to FERC relicensing. Between 2005-2015, licenses for 127 projects with over 21,000 MW of hydroelectric capacity have expired or will expire.[7] Nearly all of these projects will require the issuance of annual licenses prior to the completion of the relicensing.

Many of these projects are located in areas where ESA-listed species reside or where critical habitat has been desig-

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[6] FERC, Report on Hydroelectric Licensing Policies, Procedures, and Regulations, Comprehensive Review and Recommendations Pursuant to § 603 of the Energy Act of 2000 (May 2001) *available at* http://www.ferc.gov/legal/maj-ord-reg/land-docs/ortc_final.pdf (last visited Feb. 13, 2007).

[7] FERC, Table of Issued Licenses (Feb. 8, 2007), *available at* http://www.ferc.gov/industries/hydropower/gen-info/licensing/licenses.xls (last visited Feb. 8, 2007).

nated. This is not surprising, because there are presently over 1,800 species listed as either endangered or threatened by the U.S. Fish and Wildlife Service ("USFWS") and the National Marine Fisheries Service ("NMFS") (collectively referenced as "Service Agencies").[8] Of these, over 700 species were added to the lists between 1990 and the end of 2005. Moreover, as of February 5, 2007, critical habitat has been designated for 485 of these species.[9]

As explained below, the Ninth Circuit's decision in *Defenders of Wildlife v. EPA*, 420 F.3d 946 (9th Cir. 2005) ("*Defenders I*") threatens to expand the reach of ESA § 7 beyond what Congress intended. And, if affirmed, the decision could have significant impacts on the operation of non-federal hydroelectric projects; seriously disrupt FERC's hydroelectric relicensing program; and require significant resources of not only FERC, USFWS, and NMFS, but also of licensees and third parties.

Judge Kozinski, dissenting to the decision to deny en banc rehearing, stated "[i]f the ESA were as powerful as the majority contends, it would modify not only EPA's obligation under the CWA, but *every* categorical mandate applicable to *every* federal agency." *Defenders of Wildlife v. EPA*, 450 F.3d 394, 399 n.4 (9th Cir. 2006) (Kozinski, J., dissenting) ("*Defenders II*"). One such categorical mandate involves the statutory limitations placed upon FERC under the FPA, such as when it issues annual licenses pursuant to § 15(a). *See* 16 U.S.C. § 808(a)(1) ("the commission shall issue from year to year an annual license to the then licensee under the terms and conditions of the existing license"). Based upon these constraints and the lack of agency discretion, the D.C. Circuit

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[8] http://ecos.fws.gov/tess_public/SpeciesCountReport.do (last visited Feb. 13, 2007).

[9] http://ecos.fws.gov/tess_public/CriticalHabitat.do?nmfs=1 (last visited Feb. 13, 2007).

in *Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC*, 962 F.2d 27, 33-34 (D.C. Cir. 1992) ("*Platte River*"), found that FERC issuance of an annual license is not subject to the ESA § 7 consultation requirements. Although the Ninth Circuit never questioned the ultimate holding in *Platte River*, the court's suggestion that § 7 overrides statutory directives and constraints placed upon an agency nevertheless casts an unnecessary cloud on FERC's issuance of annual licenses during the FERC relicensing process.[10]

The application of § 7(a)(2) to FERC and other federal agency actions pursuant to the FPA, however, is not before this Court and is not fully briefed. Obviously, between federal laws, there are significant differences and nuances regarding the nature and scope of agency discretion. This is especially true with respect to the differences between the FPA's annual license provisions and the CWA's National Pollutant Discharge Elimination System ("NPDES") Permit Program transfer decision provisions.[11] These differences

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[10] Because the issuance of a new license at the end of relicensing is more than ministerial, FERC complies with the procedural and substantive aspects of § 7(a)(2) when it issues a new license. *See Cal. Sportfishing Prot. Alliance v. Pac. Gas & Elec. Co.*, 472 F.3d 593, 598-99 (9th Cir. 2006).

[11] For example, in its decision, the Ninth Circuit correctly recognized that, because FERC was obligated to issue the annual license "without any deliberation," the FERC action of issuing an annual license is different from the EPA action of making a NPDES transfer decision. *Defenders I*, 420 F.3d at 970. This distinction is noteworthy. The CWA does require EPA to evaluate (or deliberate) as to whether specific criteria have been met prior to making the transfer decision. *See* 33 U.S.C. § 1342(b) ("The Administrator shall approve each submitted program *unless he determines* that adequate authority does not exist. . .") (emphasis added). There may be some discretion inherent within this administrative evaluation. In contrast, the FPA requires that FERC issue an annual license without any deliberation or evaluation as to whether specific criteria have been met. If the license has expired and the project is subject to relicensing, FERC

and nuances are material in determining the applicability of § 7(a)(2) to a specific agency action. As such, to the extent that the Court deems it necessary to address the Petitioner EPA's Question Presented pertaining to § 7(a)(2), *Amici* urges this Court to limit the scope of its ruling to clarifying the relationship of § 7(a)(2) to the CWA's NPDES transfer decision at issue in this case.

Regardless, the Ninth Circuit should be reversed because of the fundamental errors contained within its expansive decision. Not only could the Ninth Circuit's conclusion that § 7 overrides other statutory constraints threaten to disrupt FERC's relicensing program and its issuance of annual licenses, but it could cause precipitous decisions that would modify and disrupt ongoing project operations. By expanding the reach of the ESA, the Ninth Circuit's analysis might be construed as requiring FERC to initiate § 7 consultations on numerous hydroelectric projects when FERC's enabling statute and applicable regulations provide no discretion to impose the sought-after limitations.

Federal licensing or permitting programs could not function effectively under such a scenario. FERC, for instance, might feel compelled to rely upon a biological opinion developed in the abstract and without an adequate record, and direct the licensee to adopt major modifications of project structures and operations immediately without an appropriate administrative process and substantial evidence. Such modifcations would likely include altered flow regimes, spill requirements, and other hastily adopted and costly terms and conditions that would have to be implemented in advance of any FERC proceeding. Such modifications could also impair the delivery of electric power with little or no correspond-

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must issue an annual license under the terms and conditions of the existing license. 16 U.S.C. § 808(a)(1). FERC has absolutely no discretion under such circumstances.

ing benefit to listed species, and could even result in harm to species.

The Ninth Circuit decision, therefore, creates the potential for unnecessary and irreconcilable conflicts between the ESA and other statutes, which could disrupt or interfere with the Nation's electrical energy supply. To prevent potential conflicts between the ESA and FPA, the Hydroelectric Group files this Amicus Brief in support of the Petitioners.

SUMMARY OF ARGUMENT

The Hydroelectric Group's *Amicus* Brief focuses solely on the Ninth Circuit's assertions that the ESA includes an affirmative *grant of authority* to an action agency to disregard other statutory limitations, and that the nature of the agency action—whether it is discretionary or not—is not altogether significant. In this regard, the Ninth Circuit erred by concluding that the § 7(a)(2) obligations are obligations "in addition to those created by the agencies' own governing statute." *Defenders I*, 420 F.3d at 967. Unless reversed, the Ninth Circuit decision will undermine the established principle that § 7(a)(2) applies only to "actions in which there is discretionary Federal involvement or control." *See* 50 C.F.R. § 402.03.

The Ninth Circuit erred by construing the Service Agencies' joint interpretation that § 7(a)(2) applies to discretionary agency actions, 50 C.F.R. § 402.03, as a "gloss" on and as being "congruent" and "coterminous with" the ESA's statutory reference to actions "authorized, funded, or carried out by the agency." According to the Ninth Circuit, § 7 is triggered unless "the agency in question had 'no ongoing regulatory authority' and thus was not an entity responsible for decisionmaking with respect to the particular action in question." *Defenders I*, 420 F.3d at 968. This expansive interpretation is contrary to Ninth Circuit precedent, impermissibly rejects the expert agencies' interpretation of § 7(a)(2),

and conflicts with the substantial ESA jurisprudence supporting the Service Agencies' interpretation.

Section 7 is only triggered if there is an identifiable, discretionary agency action that is being authorized, funded or carried out.

ARGUMENT

I. SECTION 7(a)(2) OF THE ENDANGERED SPECIES ACT OF 1973 DOES NOT OVERRIDE STATUTORY MANDATES OR CONSTRAINTS PLACED ON AN AGENCY'S DISCRETION BY OTHER ACTS OF CONGRESS.

A. The Endangered Species Act.

Pursuant to § 7 of the ESA and its implementing regulations, every federal agency is required to consult with either the USFWS or NMFS prior to authorizing, funding, or carrying out any action that may affect any listed species.[12] Section 7(a)(2) of the ESA provides:

> Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [designated critical] habitat . . . unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section.

Regulations implementing § 7(a)(2) state: "Section 7 and the requirements of this part apply to all actions in which there is

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[12] Other aspects of § 7 include a provision that directs federal agencies to utilize their authorities for the conservation of listed species (16 U.S.C. § 1536(a)(1)), a procedure for conferencing on proposed species and proposed critical habitat (16 U.S.C. § 1536(a)(4)), an early consultation option (16 U.S.C. § 1536(a)(3)), as well as an exemption process the Endangered Species Committee ("ESC") (16 U.S.C. § 1536(e)).

discretionary Federal involvement or control." 50 C.F.R. § 402.03 (emphasis added).

To assist the federal agency in determining whether the substantive standards of § 7(a)(2) will be met, the Service Agency (either USFWS or NMFS, depending upon the species involved) provides a "biological opinion" that includes a "summary of the information on which the opinion is based", a "detailed discussion of the effects of the action on listed species and critical habitat", and the Service Agency's opinion on "whether the action is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat . . . ." 50 C.F.R. § 402.14(h); *see also* 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.02 (defining "biological opinion").

B. The Ninth Circuit's Decision Improperly Expands the Scope of the Endangered Species Act.

The Ninth Circuit, not only incorrectly but also unnecessarily, casts a cloud on when the procedural and substantive obligations under § 7 are triggered. To begin with, the lower court opinion conflates the scope of a § 7 consultation with when a consultation is required. In order to assess whether a § 7(a)(2) consultation is required, it must be determined whether there is any affirmative, identifiable federal agency action[13] and, if so, whether the action is ministerial or

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[13] *See Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 186-88 (1978) ("TVA"), *W. Watershed Project v. Matejko*, 456 F.3d 922, 930 (9th Cir. 2006) ("Ninth Circuit cases have emphasized that § 7(a)(2) consultation stems only from "affirmative actions" of an agency"); *Envtl. Prot. Info. Ctr. v. Simpson Timber Co.*, 255 F.3d 1073, 1079-82 (9th Cir. 2001); *Sierra Club v. Babbitt*, 65 F.3d 1502 (9th Cir. 1995). The need for an affirmative and discrete agency action is apparent. *See Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 66 (2004). Yet, the Ninth Circuit, citing its earlier decision in *Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1053 (9th Cir. 1994), further suggests that there may be instances where the retention of power to authorize and carry out future discretionary

discretionary. If § 7 is required, then the federal agency must engage in the correct procedure to ensure that the action is not likely to jeopardize the continued existence of an endangered or threatened species or result in the adverse modification or destruction of critical habitat.

Here, the agencies engaged in a consultation and the USFWS prepared a biological opinion, and by doing so necessarily obviated the need to explore whether § 7 consultation is required.[14] The principal issue, therefore, involved the later inquiry: whether EPA acted arbitrarily and capriciously in relying upon a biological opinion that allegedly did not include a sufficient analysis of the effects of the action, and also whether the USFWS acted arbitrarily and capriciously in issuing such a biological opinion.[15]

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decisions is somehow itself an agency action. *Defenders I*, 420 F.3d at 969-70. But the mere ability to undertake an affirmative act in the future, even if the agency has the discretion to do so, is not any such affirmative and discrete agency action triggering § 7(a)(2). *TVA*, 437 U.S. 153, discussed later, involved an "action" that was going to be "carried out" and it does not support circumventing the "action" requirement under § 7(a)(2).

[14] The original challenge to the USFWS' biological opinion in this case occurred in the district court, presumably under this Court's reasoning in *Bennett v. Spear*, 520 U.S. 154, 170 (1997), which concluded that challenges to a Service Agency's biological opinion are to be brought under the Administrative Procedure Act, and presumably in district court pursuant to 28 U.S.C. § 1331. *Defenders I*, 420 F.3d at 955-56. The case was transferred to the court of appeals, consistent with other precedent in the Ninth Circuit and elsewhere suggesting such challenges must be brought originally in the court of appeals when the underlying agency action is reviewable initially in the court of appeals. *Id.*

[15] *See Defenders I*, 420 F.3d at 949-50 (Judge Berzon began her opinion by stating that the principal issue is whether, when engaging in an analysis of the effects of a CWA § 402 transfer decision, the ESA requires that EPA consider the impact on endangered and threatened species and their habitat when it concludes that it lacks the authority to take into account the effects of the action on such species or their habitat.); *see also id.* at 955 ("EPA failed adequately to consider the transfer's impact on

The lower court could have easily ended its opinion by concluding that EPA acted arbitrarily and capriciously, because it "relied during the administrative proceedings on legally contradictory positions" (*Defenders I*, 420 F.3d at 959), and remanded the matter back to EPA for further consideration and a reasoned explanation.[16] It chose not to do so; instead, it embarked upon a foray into § 7 generally, and in doing so erroneously questioned the longstanding view that § 7 only applies when there is an identifiable federal agency action and one that is not ministerial but involves some level of discretion.

This *Amicus* Brief, therefore, focuses solely on the Ninth Circuit's journey into the contours of § 7 and its assertions that the ESA includes an affirmative *grant of authority* to an action agency to disregard other statutory limitations, and that the nature of the agency action—whether it is discretionary or not—is not altogether significant. In this regard, the Ninth Circuit erred by concluding that the § 7(a)(2) obligations are obligations "in addition to those created by the agencies' own governing statute." *Defenders I*, 420 F.3d at 967. Unless reversed, the Ninth Circuit decision will undermine the established principle that § 7(a)(2) applies only to "actions in which there is discretionary Federal involvement or control." *See* 50 C.F.R. § 402.03; *see also Platte River*, 962 F.2d at 33-34 (§ 7 simply "directs agencies to 'utilize their authorities' to

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endangered and threatened species. . ."); *id.* at 957 ("here, lack of adequate consultation between the EPA and the FWS").

[16] If the decision had been remanded back to EPA, the court could have avoided ruling on the adequacy of the biological opinion until after EPA rendered a new final agency action that would again be reviewable. Nevertheless, the court reviewed in part "B" of its opinion (*Defenders I*, 420 F.3d at 959-62) the adequacy of the biological opinion –and concluded that it too lacked reasoned decisionmaking, because of its effects analysis. And so the court could have avoided parts "C" and "D" of its opinion.

carry out the ESA's objectives; it does not expand the powers conferred on an agency by its enabling act"); *Natural Res. Def. Council v. Houston*, 146 F.3d 1118, 1125-26 (9th Cir. 1998) ("[w]here there is no agency discretion to act, the ESA does not apply"), *cert. denied*, 526 U.S. 1111 (1999).[17]

The Ninth Circuit erred by construing the Service Agencies' joint interpretation that § 7(a)(2) applies to discretionary agency actions, 50 C.F.R. § 402.03, as a "gloss" on and as being "congruent" and "coterminous with" the ESA's statutory reference to actions "authorized, funded, or carried out by the agency." According to the Ninth Circuit, § 7 is triggered unless "the agency in question had 'no ongoing regulatory authority' and thus was not an entity responsible for decisionmaking with respect to the particular action in question." *Defenders I*, 420 F.3d at 968. As Judge Kozinski recognized in the dissent to the denial of the petition for rehearing en banc and as explained below, this expansive interpretation is contrary to Ninth Circuit precedent, impermissibly rejects the expert agencies' interpretation of § 7(a)(2) and conflicts with the substantial ESA jurisprudence supporting the Service Agencies' interpretation. *Defenders II*, 450 F.3d at 398 (Kozinski, J., dissenting). Section 7 is only triggered if there is an identifiable, discretionary agency action that is being authorized, funded or carried out.

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[17] Discretion is essential to determining the applicability of § 7(a)(2) to an agency action for primarily two reasons. First, an agency action that does not cause jeopardy or adverse modification is not barred by § 7(a)(2) prohibitions. 16 U.S.C. § 1536(a)(2). Discretion defines the boundary of causation. *See Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 769 (2004). Simply put, for an action that is pursuant to a categorical statutory mandate (i.e. a non-discretionary, ministerial action), the statutory mandate, not the agency action, is the cause of the impacts on listed species. Second, when an agency undertakes a non-discretionary action, the agency does not have an opportunity to structure the action to avoid jeopardy or adverse modification. *TVA*, 437 U.S. at 183; *Marbled Murrelet v. Babbitt*, 83 F.3d 1068, 1073-75 (9th Cir. 1996).

Over twenty years ago, the Service Agencies jointly recognized that Congress did not intend that § 7 would apply to non-discretionary agency actions.[18] 50 C.F.R. § 402.03; 51 Fed. Reg. 19,937 (1986) ("a Federal agency's responsibility under § 7(a)(2) permeates the full range of *discretionary authority*. . ." (emphasis added)). Under the agencies' interpretation, an action is non-discretionary if the agency has decision-making authority, yet is not empowered to act to protect endangered or threatened species. *Defenders I*, 420 F.3d at 979 (Thompson, J., dissenting). ESA jurisprudence uniformly followed these expert agencies' interpretation. *See Natural Res. Def. Council*, 146 F.3d at 1125-26; *Am. Forest & Paper Ass'n v. EPA*, 137 F.3d 291, 298 (5th Cir. 1998); *Marbled Murrelet*, 83 F.3d at 1073-75; *Platte River*, 962 F.2d at 33-34; *Envtl. Prot. Info. Ctr.*, 255 F.3d at 1079-82. This is because non-discretionary actions, or those over which an agency has no control, do not afford the agency an opportunity to structure the action to avoid jeopardy or adverse modification. *TVA*, 437 U.S. at 183.[19]

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[18] If the statute is ambiguous on this issue and the Service Agencies' construction is reasonable, courts are required to uphold the Agencies' statutory interpretation. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005); *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984). Because of the Service Agencies' expertise and delegated statutory authority, this regulatory interpretation is entitled to deference. *See Babbitt v. Sweet Home Chapter of Cmties. for a Great Or.*, 515 U.S. 687, 703 (1995) ("The latitude the ESA gives the Secretary in enforcing the statute, together with the degree of regulatory expertise necessary to its enforcement, establishes that we owe some degree of deference to the Secretary's reasonable interpretation.").

[19] A similar rationale exists for compliance with the NEPA, the CWA, and the River and Harbor Act of 1945, Pub. L. No. 79-14, § 2, 59 Stat. 10 (1945). *See Public Citizen*, 541 U.S. 752; *Citizens Against Rails-to-Trails v. Surface Transp. Bd.*, 267 F.3d 1144, 1151 (D.C. Cir. 2001) ("the agency does not have sufficient discretion to affect the outcome of its actions, and its role is merely ministerial, the information that NEPA

This Court's seminal decision in *TVA v. Hill* does not suggest otherwise, although, admittedly, some courts and commentators have expanded this Court's holding in *TVA* beyond the facts and issues presented there. In *TVA*, there undoubtedly remained a § 7 triggering event—something left to be "carried out." TVA still had the discretion to decide whether to proceed with the project, but at considerable cost and not contrary to any other non-discretionary duty or obligation. The plaintiffs sought to prevent TVA from "carrying out" its final construction and operation of the Tellico Dam. The parties agreed that the federal action would result in an undeniable violation of the ESA—the complete eradication of the endangered snail darter. The primary issue was whether the plain language of the ESA could be applied to the final stages of the construction and implementation of the Tellico Dam project. The United States argued that the ESA should not apply to all actions, but rather only those:

> That present the agency with reasonable alternatives; it refers to a stage in the decision-making process where the agency has not substantially completed an "action" but is still in reasonable position of being able to avoid authorizing it, funding it, or carrying it out.

Brief for the Petitioner at 24-25, *TVA v. Hill*, 437 U.S. 153 (1978) (No. 76-1701). In short, the United States sought to avoid § 7 altogether because it had substantially completed the project and believed that it would be too costly to reverse course. The Court rejected reading into the ESA any such exception, but in doing so the Court clearly indicated it was not suggesting that § 7 would apply to non-discretionary

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provides can have no affect on the agency's actions, and therefore NEPA is inapplicable."); *Nat'l Wildlife Fed'n v. Espy*, 45 F.3d 1337, 1343-44 (9th Cir. 1995); *Nat'l Wildlife Fed'n v. U.S. Army Corps of Eng'rs*, 384 F.3d 1163, 1179 (9th Cir. 2004) (the Ninth Circuit construed the CWA and the River and Harbor Act of 1945 *in pari materia* by limiting the CWA's application to discretionary activities.).

actions.[20] The Court quotes from the legislative history an example raised by Congressmen Dingell: if the Secretary of Defense has *discretion* in exercising bombing activities in the Gulf of Mexico, he would be required to ensure that his activities do not jeopardize the continued existence of the nearby whooping cranes.[21] *TVA*, 437 U.S. at 183.

Indeed, the legislative history surrounding the changes to § 7 confirms that the provision was not intended to confer additional statutory authority upon agencies or impliedly repeal statutory limitations governing agency actions. In 1973, when Congress enacted the ESA, it directed agencies to:

> utilize their authorities in furtherance of the purposes of [the] Act by carrying out programs for conservation of endangered species and threatened species . . . and by taking such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species . . .

Endangered Species Act of 1973, Pub. L. No. 93-205, § 7, 87 Stat. 884, 892 (1973). The obligations of federal agencies to carry out conservation programs (now contained in § 7(a)(1)) and to avoid jeopardy (now contained in § 7(a)(2)) were both qualified by the phrase "utilize their authorities."

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[20] Now, many years later, perhaps the most fundamental question presented by *TVA v. Hill* is overlooked. As the environmental law professor who litigated the case explains, the issue was whether courts confronted with having to remedy a violation of the Act (and in *TVA* it was admitted) should be able to override a clear congressional mandate, i.e. statutory no-jeopardy obligation, in deciding whether or not to issue an injunction. Zygmunt J.B. Plater, *Statutory Violations and Equitable Discretion*, 70 Calif. L. Rev. 524 (1982).

[21] Congressman Dingell prefaced this example by stating "[Section 7] substantially amplifie[s] the obligation of [federal agencies] to take steps *within their power* to carry out the purposes of this act." *TVA*, 437 U.S. at 183 (emphasis added).

When Congress added the § 7 consultation requirements and separated the § 7 conservation and jeopardy avoidance obligations into two separate sentences in 1978, it explained that the revision was merely a restatement of "existing law." H.R. Conf. Rep. No. 95-1804, at 18 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9484, 9486 (emphasis added). At that time, agencies' obligations under "existing law" were clearly limited by their authorities. In 1979, Congress further divided § 7(a) into subsections without making changes to the language pertaining to the conservation and jeopardy avoidance obligations. *See* Act of December 28, 1979, Pub. L. No. 96-159, § 4, 93 Stat. 1226. In 1982 and 1988, Congress amended the ESA without amending § 7(a).

Significantly, in adopting the 1988 amendments to the ESA two years after the Service Agencies clarified the role of agency discretion in the consultation process, Congress did not repudiate the regulatory construction adopted by the Service Agencies. *See Edelman v. Lynchburg College*, 535 U.S. 106, 117-18 (2002) ("By amending the law without repudiating the regulation, Congress 'suggests its consent to the Commission's practice.'") *citing EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 600 n.17 (1981) and *EEOC v. Shell Oil Co.*, 466 U.S. 54, 69 (1984).

Contrary to the Ninth Circuit decision, therefore, Congress enacted significant amendments to the ESA in 1978, 1979, 1982, and 1988 without expanding § 7(a)(2) to compel agencies to override statutory mandates or constraints on agency discretion. The legislative history of these ESA amendments does not support the conclusion that Congress intended to dramatically enlarge the scope of § 7(a)(2) to act outside the realm of agency discretion.[22]

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[22] *See, e.g.*, H.R. Rep. No. 95-1625, at 11-12 and 19-20 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9453, 9461-62, 9469-70 (App. 490-92, App. 494-97); S. Rep. No. 96-151, at 3-4 (1979) (App. 503-04); H.R.

C. Since *TVA v. Hill*, Federal Courts Have Uniformly Rejected Efforts To Expand The Application Of § 7(A)(2) To Non-Discretionary Actions.

Since *TVA v. Hill*, federal courts have uniformly rejected efforts to expand the application of § 7(a)(2) to non-discretionary actions.[23] Therefore, the Ninth Circuit's summary rejection of the caselaw and, in particular, its treatment of the D.C. Circuit's analysis in *Platte River*, is fundamentally flawed.

In *Platte River*, petitioners challenged annual licenses issued by FERC for two hydroelectric projects on the Platte River. The petitioners argued that ESA § 7 required that FERC do "whatever it takes" to protect the threatened and endangered species that inhabit the Platte River. Under the FPA, however, FERC was precluded from altering the terms of an existing license when issuing annual licenses given to a hydroelectric plant. *Platte River*, 962 F.2d at 34.

The D.C. Circuit, after examining the requirements imposed by ESA §§ 7(a)(1) and 7(a)(2), rejected as "far fetched" the effort to apply § 7 in an instance where the

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Conf. Rep. No. 96-697, at 12-16 (1979), *reprinted in* 1979 U.S.C.C.A.N. 2572, 2575-79 (App. 509-17); H.R. Rep. No 97-567, at 24-29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2807, 2824-29 (App. 518-28); S. Rep. No. 97-418, at 19-20 (1982) (App. 537-42); Pub. L. No. 100-478, 102 Stat. 2306 (1988) (Endangered Species Act Amendments of 1988).

[23] In *Riverside Irrigation District v. Andrews*, 758 F.2d 508, 512 (10th Cir. 1985), the Tenth Circuit held that the Army Corps had a mandatory obligation to consider the impacts of projects that it authorizes or funds, but it never questioned the lower court's conclusion that "[w]hile the Endangered Species Act does not expand the scope of federal agencies' authority, its clear language 'shall insure' directs them to exercise their authority under other statutes to the fullest extent possible to carry out its aims." *Riverside Irrigation Dist. v. Andrews*, 568 F. Supp. 583, 588 (D. Colo. 1983).

agency—in that case, FERC—had no authority to impose conditions on a hydroelectric licensee. *Id.* at 33-34. The court observed that § 7 simply "directs agencies to 'utilize their authorities' to carry out the ESA's objectives; it does not *expand* the powers conferred on an agency by its enabling act," adding that *TVA* is "hardly authority to the contrary." *Id.* at 34.

The Ninth Circuit, however, erroneously rejects the *Platte River* decision and concludes that it does not reflect a full consideration of the text and history of § 7(a)(2), *Defenders I*, 420 F.3d at 970-71. Yet, the precise issue, including the legislative history of § 7(a)(2) and the difference between § 7(a)(1) and § 7(a)(2), was briefed and presented to the D.C. Circuit Court. The Ninth Circuit's characterization of *Platte River*, therefore, is unsubstantiated and belied by the facts.[24]

Platte River has been followed by the majority of courts. In *American Forest and Paper*, EPA argued that the ESA required that it consider impacts to endangered species when deciding whether to approve Louisiana's NPDES permitting program under CWA § 402(b). *Am. Forest & Paper Ass'n*, 137 F.3d at 298-99. The Fifth Circuit disagreed. The court first concluded that the agency's action was "non-discretionary" because the language of CWA § 402(b) clearly states that the "EPA 'shall' approve submitted programs unless they fail to meet one of the nine listed requirements."[25]

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[24] The Ninth Circuit's further suggestion that the availability of an exemption is somehow relevant (*Defenders I*, 420 F.3d at 970) ignores the function of the exemption. The ESC, 16 U.S.C. § 1536(e)(1), can exempt an agency action from the ESA, but it has no authority to exempt an agency from other laws. For a discussion of the ESC by one who participated in the process, *see* Patrick A. Parenteau, The Exemption Process and the God Squad, *reprinted in* ENDANGERED SPECIES ACT: LAW, POLICY, AND PERSPECTIVES 131 (Baur & Irvin eds. 2002).

[25] Unlike the Fifth Circuit, based upon its expansive definition of discretion, the Ninth Circuit erroneously concluded that the EPA action of

Id. at 297. The court then determined that § 7(a)(2) does not override statutory constraints on agency discretion. The court found that § 7(a)(2) "confers no substantive powers" and "the ESA serves not as a font of new authority, but as something far more modest: a directive to agencies to channel their *existing* authority in a particular direction." *Id.* at 298-99.

Next, even the Ninth Circuit's own prior cases recognize a limitation on when § 7 may apply. In *Sierra Club v. Babbitt*, several environmental organizations sought to enjoin the construction of a logging road on a right-of-way crossing Bureau of Land Management ("BLM") forestland. Before beginning the new road construction, BLM was contractually entitled to review the proposed route and object to the project only if the "route 1) was not the most direct, 2) would substantially interfere with existing or planned facilities, or 3) would result in excessive soil erosion." *Sierra Club*, 65 F.3d at 1505. The Ninth Circuit held that BLM's contractual agreement relating to the right-of-way limited the agency's continuing ability to influence the private conduct to three factors unrelated to species conservation. The court concluded that, pursuant to 50 C.F.R. § 402.03, § 7 did not apply, because BLM lacked the requisite "*discretionary* Federal involvement or control." *Id.* at 1509 (emphasis in original). Explaining further, the court stated that, "where . . . the federal agency lacks the discretion to influence the private action, consultation would be a meaningless exercise; the agency simply does not possess the ability to implement measures that inure to the benefit of the protected species." *Id.*

In *Natural Resources Defense Council v. Houston*, the Ninth Circuit found that federal reclamation laws gave the Bureau of Reclamation sufficient discretion to trigger a

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approving the NPDES transfer to a state involved discretion. *Defenders I*, 420 F.3d at 970.

§ 7(a)(2) consultation. *Natural Res. Def. Council*, 146 F.3d at 1126 ("government is to renew the contracts on 'mutually agreeable' terms, that water rights are based on the amount of available project water, and that the Secretary of the Interior has the discretion to set rates to cover an appropriate share of the operation and maintenance costs.") (citations omitted).

In *Turtle Island Restoration Network v. National Marine Fisheries Service*, 340 F.3d 969 (9th Cir. 2003), the Ninth Circuit analyzed whether NMFS's issuance of a fishing permit pursuant to the High Seas Fishing Compliance Act ("HSFCA"), 16 U.S.C. §§ 5501-5509, was a discretionary agency action invoking the ESA's consultation requirements. *Id.* at 970. The court defined discretion by stating that "the discretionary control retained by the federal agency must have the ability to inure to the benefit of a protected species." *Id.* at 974 (citation omitted). After examining the relevant statutory provisions of HSFCA, which expressly allow NMFS to place conditions and restrictions upon the issuance of a permit, the court concluded that NMFS had "ample discretion" to include conservation measures in an issued permit, thereby triggering the ESA consultation requirement. *Id.* at 975.

Ground Zero Center for Non-Violent Action v. U.S. Department of the Navy, 383 F.3d 1082 (9th Cir. 2004) involved a challenge to the Navy's decision to expand the Trident submarine in Bangor, Washington. The President had ordered the expansion and the Navy lacked discretion to ignore that order. The Ninth Circuit concluded that § 7(a)(2) was inapplicable, because the Navy lacked discretion to cease the Trident operations or change the siting location. *Id.* at 1092.

Other Ninth Circuit precedent similarly recognizes that the application of § 7(a)(2) depends upon the existence of meaningful discretion. *See Envtl. Prot. Info. Ctr.*, 255 F.3d at 1083 (agency did not retain discretionary control over incidental take permit because there was no requirement to reinitiate consultation on subsequently listed species); *Marbled Mur-*

relet, 83 F.3d at 1073-75 (nondiscretionary actions or those over which an agency has no control afford the agency no opportunity to customize the action to avoid jeopardy or adverse modification).

As these decisions demonstrate, consistent with other circuits, the Ninth Circuit historically has conditioned the application of ESA § 7(a)(2) on whether the agency has discretion to take the relevant action to benefit the ESA-listed species. As Judge Thompson recognized, "the court previously recognized that "an agency may have decisionmaking authority and yet not be empowered, either as an initial matter or in conjunction with some continuing authority, to act to protect endangered or threatened species." *Defenders I*, 420 F.3d at 979 (Thompson, J. dissenting). The majority's opinion is the first instance where the Ninth Circuit has applied § 7(a)(2) where the agency lacks discretion.

The structure of the ESA underscores this case law. Congress expressly stated that one of the purposes of the ESA is that agencies "shall utilize their authorities in furtherance of the purposes of this chapter." 16 U.S.C. § 1531(c)(1). In § 7(a)(1), Congress repeated this prescription that "Federal agencies shall . . . utilize their authorities in furtherance of the purposes of this chapter. . . ." 16 U.S.C. § 1536(a)(1). Congress' intent to focus on the scope of an agency's authority —or discretionary actions—is also evident elsewhere in the ESA.[26]

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[26] When describing the consultation process, the Committee on Environment and Public Works commented that "[i]t is the intent of the committee that this review process would take place well before the exercise of agency discretion which would result in contracts for construction, actual construction activities, or other potentially destructive activity." H.R. Rep. No. 1625, 95th Cong. 2d Sess. (1978), *reprinted* in A LEGIS. HIST. OF THE ESA OF 1973, AS AMENDED IN 1976, 1977, 1978, 1979 AND 1980 FOR THE COMM. ON ENV'T & PUBLIC WORKS OF THE U.S. SENATE, 97th Cong. 2d Sess. 744 (1982). When issuing a biological

Finally, a primary purpose of § 7(a)(2) consultation is to insure that the Service Agencies with wildlife expertise have meaningful opportunities to influence decisions by the action agencies. Where the action agencies have no authority to make decisions, and thus no discretion, this fundamental purpose of the consultation processes cannot be achieved because the ESA does not provide federal agencies with additional authority to do what Congress has not otherwise authorized to be done.

CONCLUSION

For the reasons set forth above, the Hydroelectric Group respectfully requests that the Court reverse the Ninth Circuit's decision in *Defenders I* and hold that § 7(a)(2) does not override statutory mandates or constraints placed on an agency's discretion by other Acts of Congress.

Respectfully Submitted,

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opinion in which jeopardy exists, the Secretary is limited to suggesting reasonable and prudent alternatives that "can be taken by the Federal agency or applicant. . ." 16 U.S.C. § 1536(b)(3); 50 C.F.R. § 402.02. *Cf. Sw. Ctr. for Biological Diversity v. U.S. Bureau of Reclamation*, 143 F.3d 515, 523 (9th Cir. 1998).